United Nations/International Maritime Organization

Diplomatic Conference on Arrest of Ships

Distr.
GENERAL

A/CONF.188/3/Add.3
23 February 1999

ENGLISH
Original: ENGLISH/FRENCH/
SPANISH

Geneva, 1 March 1999
Item 8 of the provisional agenda

PREPARATION AND ADOPTION OF A CONVENTION ON ARREST OF SHIPS

Compilation of comments and proposals by Governments and by intergovernmental and non-governmental organizations on the draft articles of a convention on arrest of ships

CONTENTS

	Paragraphs
INTRODUCTION	1
COMPILATION OF COMMENTS AND PROPOSALS	2 - 21
Government of Italy	2 - 8
Latin American Association of Navigational Law and Law of the Sea (ALDENAVE)	9 - 21

GE.99-50581 (E)

INTRODUCTION

1. This document sets out the comments and proposals of the Government of Italy and the Latin American Association of Navigational Law and Law of the Sea (ALDENAVE), a non-governmental organization, on the draft articles for a convention on arrest of ships that were received between 1 January and 19 February 1999.

COMPILATION OF COMMENTS AND PROPOSALS

Government of Italy

A. *Article 1, paragraph 1 - Definitions, list of maritime claims*

2. In view of the stance already taken by the Italian delegation at the eighth session of the UNCTAD/IMO Joint Intergovernmental Group of Experts on Maritime Liens and Mortgages and Related Subjects (London, 9-10 October 1995), we reaffirm that it is appropriate to establish a *non-exhaustive* list of maritime claims. This would leave some flexibility in the wording of the article so that the Convention could be continually adjusted to suit any legal changes that occurred in this area in future.

B. *Article 2, paragraph 3 - powers of arrest*

3. This is an addition to the provisions of the 1952 Convention, and causes confusion mainly on practical grounds, since arresting a ship that is already sailing would appear to be difficult to accomplish.

C. *Article 4, paragraphs 2 and 4 (b) (ii) - security and release of security given*

4. Following the comments made at UNCTAD by certain delegations on limiting the amount of security to be provided, the phrase "not exceeding the value of the ship" in paragraphs 2 and 4 (b) (ii) will be the subject of earnest and detailed discussion at the forthcoming Diplomatic Conference.

5. Italy is in favour of retaining the phrase, given the provisions of its Code of Civil Procedure governing distraint which, according to article 463 of the Shipping Code, apply by extension to the Shipping Code.

6. Article 468 of the Code of Civil Procedure explicitly states that in order to secure a release from distraint from the courts, the debtor must furnish sufficient security, due regard being had to the "amount owed which gave rise to the distraint" and the expenses incurred "by reason of the value of the items distrained".

7. Limiting the security that must be furnished under the Convention in order to secure a release from arrest thus seems perfectly consistent with current national legislation on the matter.

D. *Article 8 - Application*

8. Empirical considerations suggest that to the exceptions indicated in article 8, paragraph 2, there should be added another referring to

article 648 (b) of the Shipping Code, which states that vessels employed in shipping services may not be forcibly expropriated or subjected to other precautionary measures such as arrest itself except with the formal authorization of the Minister of Transport and Shipping.

Latin American Association of Navigational Law and Law of the Sea (ALDENAVE)

9. We hereby forward our brief suggestions on the draft amendments to the 1952 Convention Relating to the Arrest of Seagoing Ships (TD/E/IGE.1-/5), for consideration at the Diplomatic Conference to be held between 1 and 12 March 1999.

10. Firstly, it must be pointed out that the 1952 Convention is, in international legal terms, an exception to normal practice because it offers only formal or procedural solutions, which the academic literature says are the preserve of national legislation. As a result, the only justification for the Convention is that it accomplishes the specific objective pursued, since:

(a) The 1952 Convention establishes a formal regulatory system which can permit the arrest of a ship to secure the satisfaction of any judgment that may eventually be pronounced because the holder of a maritime lien cannot, sometimes in a matter of hours, fulfil the standard procedural requirements (likelihood of the claim alleged, valid title, precise value of the claim and risks of delay) under formal national or domestic regulations for his application to proceed;

(b) Arrest under the Convention is preventive or executive, detaining a ship so as to secure the satisfaction of any judgment that may eventually be pronounced if title to the underlying lien is recognized by the courts, and thus preventing it from being exposed to further risks *de facto* (during operation) or *de jure* (if the owner takes on further obligations which enjoy preference);

(c) The 1952 Convention is constructed on a dual foundation: the claim asserted must derive from a maritime claim and arrest must be ordered by a competent judicial authority.

11. These three points must be borne constantly in mind when the 1952 Convention is amended, since they provide the justification for the remedies it affords. We propose the following amendments:

Article 1.1: SHIPS MAY BE ARRESTED PURSUANT TO THIS CONVENTION:

(a) IN RESPECT OF MARITIME LIENS RECOGNIZED IN ARTICLE 4 OF THE 1993 INTERNATIONAL CONVENTION ON MARITIME LIENS AND MORTGAGES;

(b) IN RESPECT OF CLAIMS ARISING OUT OF THE OPERATION OF THE SHIP WHOSE ARREST IS SOUGHT.

12. Most of the "maritime claims" listed in the draft correspond to maritime liens within the meaning of the 1993 MLM Convention; it would be sound legislative practice simply to refer to that Convention. On the other hand,

the other claims proposed (hypothèques or mortgages, commissions, brokerages or agency fees, ownership or possession of the ship, disputes between co-owners) do not arise out of the "operation of the ship" (e.g. a hypothèque may be given as security on a loan, for civic activities or even for gambling debts) and can be pursued without the need for arrest of the ship under this Convention to secure application of the relevant procedures.

13. Arrest "for claims arising out of the operation of the vessel" (towage, general average, tort, insurance premiums, supplies) must, however, be admitted since these claims match the description (operation of the ship).

> Article 1.2: "ARREST" MEANS THE DETENTION, NOTIFIED TO ITS REGISTER, OR BAN OR RESTRICTION ON REMOVAL OF A SHIP IMPOSED AS A CONSERVATORY MEASURE BY ORDER OF A COURT TO SECURE A MARITIME CLAIM, BUT NOT THE SEIZURE OF A SHIP IN EXECUTION OF A JUDGMENT, ARBITRAL AWARD OR OTHER ENFORCEABLE INSTRUMENT.

14. Immobilizing a ship or restricting its removal (the meaning of the English term "arrest") is no impediment to the sale or mortgage, gift in payment, donation etc. of the ship, even fraudulently, to escape arrest; the measure can, however, be made effective by notifying the relevant register for entry in the records. It will thus be possible to secure the satisfaction of any eventual judgment, which is the reason for arresting the ship, besides immobilizing the ship or prohibiting it from sailing.

> Article 2.3: NO SHIP WHICH AT THE TIME OF ITS ARREST IS LOADED AND HAS PERMISSION TO SAIL FROM THE MARITIME AUTHORITY MAY BE ARRESTED.

15. The arrest of a ship "ready to put to sea" must be rejected, it being an incontrovertible principle that navigation must always be facilitated, especially when the ship is "ready to sail" or has permission to do so from the Maritime Authority. The stipulation that the ship must be loaded has been added to prevent it from sailing empty solely in order to evade arrest. Argentine law (art. 541), the Italian Code (art. 645), the Netherlands (Code of Civil Procedure, art. 582), and the Swedish (art. 345), Finnish (art. 278) and German (art. 482) Codes rule out arrest of a ship that is "ready to sail". Before then the ship may be ordered arrested as a conservatory measure, but the prohibition on sailing may not be enforced.

> Article 3.1: should be brought into line with the wording proposed for article 1.1.
>
> Articles 6.2.a and 6.2.b: the grounds cited do not make sense. Only a court should be able to determine how much security to demand, and it must be presumed that court orders are not wrongful.
>
> Article 7.1: insert "... to arbitration PROVIDED THAT SUCH AGREEMENT WAS REACHED AFTER THE EVENT OR AGREEMENT THAT GAVE RISE TO THE CLAIM UNDERLYING THE APPLICATION FOR ARREST."

16. The proposed insertion would permit only "ex post facto" agreement in order to avoid the insertion of clauses "for form's sake" that might preclude arrest of a ship.

Article 7.3: insert "... order a period of time NOT TO EXCEED 30 DAYS, AFTER which the claimant..."

17. Stipulating that the court should order a period of no more than 30 days prevents the claimant from being allowed time *ad libitum* and prevents such time from being construed as a procedural delay.

Article 8.2: insert "... to ships OPERATING IN THE SERVICE OF THE PUBLIC AUTHORITIES WHEN THE CLAIM IN RESPECT OF WHICH ARREST IS SOUGHT AROSE."

18. This is proposed in response to paragraph 99 of document TD/B/IGE.1/L.2. The intention is to establish that a ship's not being subject to arrest is not a matter of its being owned or operated by a State but of its being used in the "public service" (as a hospital, isolation hospital etc.), even if owned by a third party, at the moment when the claim arises.

19. NOTE: To confirm the purpose of the Convention, the adjective "*preventivo*" should be added before "*embargo*" throughout the Spanish text.

20. We also propose:

New article: THE CLAIMANT SEEKING ARREST MUST PROVIDE BRIEF CORROBORATION OF THE CIRCUMSTANCES UNDERLYING HIS CLAIM.

FOR APPLICATIONS IN RESPECT OF CLAIMS ARISING OUT OF COLLISIONS, SALVAGE OR OTHER SHIPPING ACCIDENTS, PRODUCTION OF THE PROTEST OR ACCOUNT GIVEN BY THE CAPTAIN OR SHIP'S AGENT TO THE APPROPRIATE AUTHORITY OR CONSUL SHALL SUFFICE.

ARRESTS OF SHIPS IN RESPECT OF CLAIMS OTHER THAN THOSE REFERRED TO IN ARTICLE 1.1 MUST COMPLY WITH THE REQUIREMENTS OF ORDINARY LAW.

21. The wording proposed here, which appears neither in the 1952 Convention nor in the draft amendments, will facilitate rapid processing of applications for arrest, and is inspired by accumulated experience.

- - - - -